No. 71-1178

In The Supreme Court of the United States

OCTOBER TERM, 1972

GULF STATES UTILITIES COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
CITY OF LAFAYETTE, LOUISIANA,
CITY OF PLAQUEMINE, LOUISIANA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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ARGUMENT

INTRODUCTION

The Brief of Respondent Cities and other opposing briefs have revealed for the first time Cities' objective by intervention in this proceeding and thereby has added a new dimension to this case. Cities want Gulf States (and no doubt the other companies they accuse of having conspired in violation of the Sherman Act) to use their transmission lines to wheel (move or transmit) power generated by LEC Pool[1] members between and among such members (members are LEC, the two Cities, and Dow). This feature is emphasized here because it is new. It does not supersede

[1] Shortened or abbreviated names or references to parties, persons, statutes, etc., used in Petition for Certiorari and Brief for the Petitioner where readily identifiable are used here without reidentification. In addition, for convenience, we will sometimes refer to the following by the shortened appellation indicated:

or affect the basic point that the FPC has found Cities' allegations irrelevant to its authorization of the issuance of securities by Petitioner and has also found as a fact on the undisputed record that the object of Petitioner's issuance of bonds was to refund short-term debt. Material aspects of these matters will be dealt with under the topical headings which follow.

"PSCI Br."	Brief Amicus Curiae of Public Service Company of Indiana filed in support of Gulf States, Petitioner.
"Solicitor Gen. Br."	Brief of the United States as Amicus Curiae submitted by the Solicitor General filed in this cause.
"Dow or Dow Br."	The Dow Chemical Company or Brief for the Dow Chemical Company as Amicus Curiae filed in this cause.
"Am.Pub.Pwr.Assoc.Br."	Brief of the American Public Power Association filed as Amicus Curiae in this cause.
"Opposing Briefs"	Respondent Cities' Br., Solicitor Gen. Br., Dow Br., and Am. Pub. Pwr. Asso. Br.
"LEC"	Louisiana Electric Cooperative, Inc.
"LP&L"	Louisiana Power & Light Company.
"CLECO"	Central Louisiana Electric Company.
"ICC"	Interstate Commerce Commission.
"SEC"	Securities & Exchange Commission.
"FPC"	Federal Power Commission.
"Cities"	City of Lafayette, Louisiana, and City of Plaquemine, Louisiana, Respondents herein.
"LEC Pool"	Agreement between LEC, Cities, and Dow entitled Interconnection and Pooling Agreement, dated August 6, 1968, and appearing in full at R. 82, et seq. The pool designation is borrowed from Cities, notwithstanding that the LEC has never sought to intervene as a party to this proceeding nor to file a brief herein.

Where numbered statutory sections are mentioned without other identification, e.g., § 204, such numbered section refers to a section in the Federal Power Act, 16 U.S.C. § 824, et seq., unless the contrary is clearly indicated by context.

I. Respondent Cities Submit and Argue a Question Not Presented in Petition for Certiorari and Accordingly It Should be Disregarded.

Question 2 offered by Cities' brief, p. 3, raises an additional question not presented by Petition for Certiorari, Pet. 2, accordingly is not in compliance with Supreme Court Rule 40, Sec. 3, and Rule 40, Sec. 1(d)(2), and therefore should be disregarded. Such question raised by Cities concerns actions by the FPC subsequent and obedient to the judgment of the court below. See argument in Cities' Br., 46-47.

II. Cities Argue § 204 Enables the FPC to Compel Wheeling by Indirection Even Though § 202(b) Withholds Power to do so Directly.

A. Compulsory Wheeling of Energy by Gulf States is Cities' Goal.

Wheeling of electric energy by Gulf States for the benefit of the LEC Pool members was not sought or mentioned in Cities' Petition to Intervene in the FPC proceeding or until the filing of opposing briefs in response to Petitioners' brief. With the filing of opposition briefs, what could only have been suspected before is now revealed as the real goal behind insistence on the use of § 204 as a tool for antitrust law enforcement. The Cities' purpose is now clear. Cities now say what they want is the use of Gulf States' transmission lines to wheel their own electric energy between and among LEC Pool members:

> In short, by combination, *the Companies have forced the Cities, Dow and LEC to rely upon the transmission capacity of the companies* which they have adamantly refused to make available to the pool members. (Emphasis supplied). Cities' Br. 44.

And again:

> The Commission, of course, whether or not it has the power to compel transmission under Section 202, has ample authority to condition its grants of authority [to issue securities], under Section 204 or otherwise, either upon the cessation of illegal practices or *upon the transmission of power for others over facilities of the applicant,* when such transmission is not inconsistent with good operating practice, in order to cure for the future the illegal practices which have existed in the past. (Emphasis supplied.) Cities' Br. 45-46.

Dow confirms the relevation:

> It is reasonable for Cities to ask, and we think FPC has a duty to require, that use of the proceeds of the issue of securities for carrying out the agreement with LEC be conditioned upon cessation of the conspiracy and an undertaking by Gulf States to provide the pool members with a reasonable alternative to the benefits they had provided for themselves in the pooling agreement. *This could be accomplished by a requirement that energy be transmitted over the companies' system for the pool members at a reasonable and nondiscriminatory rate.* (Emphasis supplied.) Dow Br. 8.

Again:

> A treble damage suit after the fact would be a poor substitute for an order from FPC *conditioning approval of the issuance of securities upon the transmission of electric power for Dow* on reasonable and nondiscriminatory terms. (Emphasis supplied.) Dow Br. 16.

And again:

> So also the power of FPC to refuse to authorize an issue of securities where the proceeds are to be used for an unlawful object includes the power to grant the authorization on conditions reasonably adapted to cure the evil which otherwise would require denial of the authorization. The precise condition will need to be determined by FPC after hearing *but a condition re-*

quiring Gulf States to transmit power for the members of the pool on a reasonable and non-discriminatory basis would seem to be both necessary and appropriate. (Emphasis supplied.) Dow Br. 17-18.

Even the Solicitor General gives implicit blessing to Cities' purpose, saying, "It does not appear that additional Commission-ordered interconnections under Section 202(b) between the Cities and the private power companies would have provided the Cities with the economies they were seeking from independent arrangements with LEC and Dow Chemical." Solicitor Gen. Br. 35.

B. The FPC is Without Power to Order Wheeling Under § 202; It Should Not be Within Its Power to Require It by Indirection Under §204, Thereby Expanding the Area of Its Surveillence and the Reach of Its Powers.

Both the Solicitor General[2] and the FPC[3] agree and those LEC Pool members appearing here at least implicitly recognize that the FPC would have no power to compel Gulf States to wheel power among the LEC Pool members in a § 202(b) proceeding. Nevertheless, had the FPC yielded to Cities' request that the matter be sent down for a hearing[4] on the antitrust issues and that they be resolved before

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[2] See Solicitor Gen. Br. 87-88 in #71-991, *Otter Tail Power Company* v. *United States of America* pending in this Court.

[3] *City of Paris, Ky.* v. *Kentucky Utilities Co.*, 41 FPC 45 (1969).

[4] Cities' Petition to Intervene, R. 66.

As discussed pp. 19-20 herein, § 204 did not provide Cities the right to a hearing in the proceeding below. Neither § 306, 16 U.S.C. § 825e, Pet. App. 53a nor § 307, 16 U.S.C. § 825f, Pet. App. 54a, reach § 204 proceedings. Section 308, 16 U.S.C. § 825g, Appendix to this brief at p. 1a, adds nothing to Cities' rights as intervenors. The FPC found in its order, Pet App. 35a, R. 303, only that intervention may be in the public interest for purposes of Commission consideration of their petition.

granting authority for the issuance of Gulf States' securities, the practicalities of the situation could have compelled Gulf States to enter some arrangement with Cities impairing its ability to render service to its own customers and not required of it by law or within the power of the FPC to order, simply to escape interference with financing essential to continuation of its operations. What now appears as a reasonable rationalization from opposing briefs is that Cities sought by their initial intervention to create a situation to compel Gulf States to proceed with "the establishment of a program which will rectify the damage which has already been done"[5] by agreeing to wheel power[6] so as to activate the pool in which Cities allege they hold agreements to participate, and what is apparently sought now is either such an agreement by Gulf States under compulsion of meeting the necessity of timely scheduling of financings or a judicial holding which would support an order of the FPC hereafter to condition authority for security issues upon Gulf States' agreement to enter upon some such wheeling arrangement, thus accomplishing by indirect use of § 204 what § 202(b) withholds from the FPC.

Applied to the fact situation alleged by Cities in their intervention before the FPC, the literal application of *Denver & Rio Grande*[6a] would by indirection expand the jurisdiction in two directions. On the one hand it would extend the area of surveillance and on the other hand extend the scope of the relief to intervenors or compulsion of the applicant. Cities propose this expanded power be wielded, not in defense of the public interest, but for their special benefit. The mild sounding suggestion of the Solicitor General that the FPC must consider allegations of antitrust viola-

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[5] Cities' Petition to Intervene, R. 65.

[6] Dow Br. 4.

[6a] Denver & Rio Grande Western R. Co. v. United States 387 U.S. 485 (1967).

tions in connection with its orders issued under § 204, the same as in other sections under which it wields authority, in fact would make § 204 the spearhead of antitrust investigation and activity for it would be made the instrument for investigation of activity the FPC otherwise has no authority to consider and to impose conditions which would compel action it could not directly order. Such construction of § 204 would extend the area of FPC surveillance beyond the periphery of FPC jurisdiction and as far as the FPC could visualize or suspect law violation. Cities' contention is that because the FPC holds the *power* to condition or to withhold altogether authority to issue securities, it must examine allegations of alleged prospective unlawful activity which might be funded indirectly or remotely by the proceeds of the securities issue whether or not such activity were otherwise subject to the FPC's control. As pointed out in Pet. Br. 21, the frivolous and competitive litigation, the mounting of public relations drives and lobbying efforts in which Gulf States and other companies were alleged to have engaged or conspired, are not operational activities which fall within the reach of FPC regulation under Part II of the Federal Power Act,[7] or for which the FPC is granted a power of enforcement by any other laws unless they are permitted to be reached under § 204. As we noted in Pet. Br. 23, n. 52, if the FPC must consider or investigate charges that funds generated by a securities issue will be used to

[7] Cities' Br. 19-20 reargues the application here of § 10h, Part I of the Act, 16 U.S.C. 803(h). That section is inapplicable in the field of interstate commerce in electric energy which Congress first occupied with the enactment of the Federal Power Act in 1935 (Part II of Title II of the Public Utility Act of 1935, 49 Stat. 847-853; 16 U.S.C. 824-824h). *Pennsylvania W. and P. Co.* v. *FPC*, 89 U.S. App. D.C. 235, 242-243, 193 F.2d 230, 237-238 (1951), affirmed, 343 U.S. 414 (1952). Numerous decisions establish the necessity for reading the 1935 Part II independently of the 1920 Part I. See, e.g., *United States* v. *P.U.C. of California*, 345 U.S. 295, 302-304 (1953); *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 22-24 (1952); *FPC* v. *Southern California Ed. Co.*, 376 U.S. 205, 216-220 (1964).

further activities in violation of the Sherman Act, not otherwise the responsibility of the FPC to control, then we see no difference between allegation of antitrust violations and allegations that the funds will or might be used to pay wages pursuant to hiring practices in violation of the equal opportunity law, wage and hour law, safety and pollution law, or any other law the enforcement of which is not entrusted to the FPC.

On the other hand, the contention is that the FPC should impose as a *condition* to an order authorizing issuance of securities something beyond its power to order directly. This Court has held such a condition improper in an action under the Interstate Commerce Act.[8] If § 204 were construed as granting to the FPC the power to require wheeling as a condition to approval of issuance of securities, it would impute to Congress an intention to grant power to the FPC to do indirectly what the Congress has denied it the power to do directly[9] [by withholding from the FPC the power to order wheeling under § 202(b)].

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[8] *U.S.* v. *Chicago, M., St. P. & P.R. Co.*, 282 U.S. 311, 325 (1930).

[9] In discussing the interplay of authority of the Justice Department and the Federal Power Commission with respect to issues affecting the antitrust laws and the Natural Gas Act, this Court said in *California* v. *Federal Power Commission*, 369 U.S. 482, 490 (1962):

"If that administrative action were approved, the Commission would be allowed to do by indirection what it has no jurisdiction to do directly."

To like effect this Court, in discussing and analyzing its previous opinion in *Montana-Dakota Utilities Co.* v. *Northwestern Pub.Serv. Co.*, 341 U.S. 246 (1951) said:

"In the absence of any indication that Congress intended that despite the absence of any reparations power in the Federal Power Commission the federal courts should entertain suits for reparation of unreasonable rates, and refer to the Commission the controlling issue of past unreasonableness, *the Court declined to permit the Commission to accomplish indirectly through such a proceeding that which Congress did not allow it to acomplish directly.*" Emphasis supplied.) T.I.M.E. Incorporated v. United States, 359 U.S. 464, 470 (1959).

Dow, Br. 17, argues from a premise that since the FPC has the power to withhold authority to issue securities altogether, a public utility should not be heard to complain because issuance on any reasonable terms is better than no issuance at all. Even if otherwise applicable or persuasive, such cases would be unavailing here because the words "reasonable terms" permitted in those cases do not fit the extraordinary remedy sought by Cities in this case. Furthermore, all the cases cited by Dow, p. 17, and in Cities' brief, p. 46, are either rate cases under the Natural Gas Act or hydroelectric cases under Part I of the Federal Power Act and have no application here. For example, the Natural Gas Act cases permit the imposition of conditions with respect to gas prices, a matter the FPC had direct responsibility for under other sections of the Natural Gas Act. While such cases may have permitted the FPC through its conditioning powers to modify or even expand its procedures for control over prices, they clearly did not sanction or support use by the FPC of conditions as a source of plenary power over matters beyond the jurisdiction of the FPC[10] as urged by the Cities. Cities Br. 46 cites *FPC* v. *Idaho Power Company*, 344 U.S. 17 (1952), a case in which the FPC, acting under Part I of the Act, had granted a hydroelectric license on condition that the licensee permit interconnection of transmission facilities of the United States with the licensee's transmission lines and transfer over its lines energy generated in power plants owned by the United States. Cities cite this case as persuasive that the FPC has authority to require Gulf States to wheel energy for the LEC Pool members as a condition to a § 204 order. The cited case is not in point. The opinion makes abundantly clear that its holding is limited to a Part I function. As the court said: "Part I and Part II provide different regulatory schemes. Part II is

[10] United States v. Chicago, M., St.P. & P.R.Co., 282 U.S. 311 (1931).

an exercise of the commerce power over public utilities engaged in the interstate transmission and sale of electric energy." (P. 22) After analyzing sections of Part I of the Act, the court stated: "Under these sections the Commission is plainly made the guardian of the public domain." (P. 23) "And the Commission might well determine . . . that if public lands are to be used for the transmission of power, conservation of the 'water power resources of the region' require that public power as well as private power be transmitted over them." *Ibid.* And further, *"We, therefore, cannot construe the limitation on the new powers conferred by Part II* as a repeal by implication of the powers over licensee that are deeply ingrained in Part I of the Act and put there by the Congress for the purpose of protecting the public domain." (Emphasis supplied.) *Ibid.* Section 204 is, of course, in Part II.

C. To Permit Wheeling as a Condition to a § 204 Financing Order Would Mean That the Congress Intended to Grant Unrestricted Power to Impose Conditions in an Area of Responsibility in Which Only Restricted Power is Granted to Make Direct Orders Under § 202(b).

In §202(b), the Congress authorized the FPC under certain circumstances not only to require public utilities to establish physical interconnection but also to sell energy with the persons thus interconnected. However, the Congress wrote into the statute an express *proviso* that the FPC has *no authority* to compel a public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The same section provides further: "The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of costs between them and in the compensa-

tion or reimbursements reasonably due to any of them." A sale of electric energy of necessity involves (i) the generation of electric energy and (ii) transmission of seller's energy over the seller's transmission system to a point of delivery to the buyer. Thus § 202(b) establishes certain principles and limitations on the power of the FPC to order transmission incident to the sale or exchange of power as contemplated therein. "Wheeling" is generally considered to include the use of the transmission system of one party for the transmission of energy from the system of a second party to the system of a third party. If § 204 were construed to grant the FPC power to require wheeling as a condition to authorizing issuance of securities, it would not be under the statutory restraint with regard to transmission which is imposed in § 202(b). We submit that Congress intended no such inconsistency and did not grant or intend to grant a power to the FPC by § 204 to authorize issuance of securities on a condition that the applicant agree to wheel power.

D. Whether Wheeling of Energy Could be Compelled to Enforce the Antitrust Laws in a Different Forum or by Others Than the FPC is Not at Issue Here.

As previously stated, the Solicitor General and the FPC agree that under § 202(b) the FPC has no power to compel wheeling.[11] The case here concerns power of the FPC under § 204. Whether the Justice Department or any other by a proceeding in a United States District Court may seek, and whether such a court may grant, an order to compel a public utility to wheel power as an appropriate remedy for Sherman Act violation is beside the point. That would be a function of enforcement of the antitrust law, a function not entrusted to the FPC. *California* v. *Federal Power Commis-*

[11] Supra, p. 5.

sion, 369 U.S. 482 (1962); *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944); *City of Pittsburg* v. *Federal Power Commission*, 237 F. 2d 741 (D.C. Cir.. 1956). It is true that if § 202(a) is a declaration by the Congress that the antitrust laws do not apply to bulk supply of electric energy,[12] then Cities' case falls because of the factual nature of Cities' allegations in this proceeding. But the case before the Court concerns only a § 204 proceeding for authorization of securities. It is thus more narrow in some respects than the position urged by PSCI and Mr. Wahrenbrock and yet more broad in other respects. It is more narrow because the construction urged in the PSCI brief has far wider significance to the laws governing transmission and supply of bulk power than is presented in a § 204 proceeding. Our case is more broad because this Petitioner contends that the FPC should be freed of the burdens Cities would have the Court impose upon it in any § 204 proceeding regardless of the possible involvement of competition in bulk power supply.

III. FPC Should Not be Required to Consider Antitrust Allegations in a Proceeding Under §204 for Authorization of Securities.

The prime purpose of Gulf States' Petition for Writ of Certiorari was to seek a holding by this Court that the Congress enacted § 204 of the Federal Power Act for the limited purpose of preventing the issuance of securities which might impair the Company's financial integrity or its ability to perform its public utility responsibilites.

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[12] This contention is forcefully argued *amicus curiae* by Howard E. Wahrenbrock, PSCI Br. 10, citing *Pennsylvania Water and Power Co.* v. *FPC*, 343 U.S. 414, 421-23 (1952), affirming 193 F.2d 230, 233-38. As the Federal Reporter discloses, Mr. Wahrenbrock, as Asst. Gen. Counsel for the FPC, appeared for it before the D.C. Court of Appeals in the *Penn Water* case.

A. Opposing Briefs Misinterpret Legislative History Which Indicates the Limited Purposes of § 204.

The legislative history of the Public Utility Act of 1935, as well as that of the 1920 amendment of the interstate Commerce Act containing what is now § 20a from which § 204 of the Federal Power Act was in part adapted, bear ample evidence of a congressional purpose to bring to an end the financial abuses of the railroad companies and electric and gas holding company complexes. There seems to be no disagreement that the primary purpose of § 20a in the Interstate Commerce Act and § 204 in the Federal Power Act was to end such financial abuses. However, opposing briefs without exception[13] profess to see an inconsistency in the FPC position that although it may appropriately take into account antitrust laws and anticompetitive activities in proceedings under sections of the Act by which it regulates operations or activities inherent in the utility function[14] nevertheless in § 204 proceedings to approve issuance of securities such considerations are not relevant.[15] Typical of such positions is Solicitor Gen. Br., 34, agreeing with the FPC that it must consider anticompetitive practices in proceedings under sections 202, 203, 205, 206, and 207, but then adding, p. 35:

> Nothing in the Act suggests that the term "public interest" is used in a different and narrower sense in connection with the issuance of securities under Section 204(a) than it is used with respect to an interconnection under Section 202(b) or an acquisition or a merger under Section 203(a).

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[13] American Public Power Association is particularly emphatic. See Am. Pub. Pwr. Assoc. Br. 11.

[14] FPC Br. 12-14.

[15] FPC Br. 20 et seq.

This argument takes no account of the fact that issuance of securities *per se* is not a public utility operation. Only in the Interstate Commerce Act and in the Public Utility Act of 1935 (the ICC under the Interstate Commerce Act, the SEC under the Public Utility Holding Company Act, and the FPC under the Federal Power Act), and in no other industry regulatory act which has come to our attention, does the Congress provide explicitly for jurisdiction over the issuance of securities by the regulating agency. We submit that control over the issuance of securities was granted by Congress in the Public Utility Act of 1935 only because it dealt with an area where financial abuses were apparent and that such control was intended only to stop such abuses.

It may be that the FPC may weight the antitrust laws and anticompetitive considerations among other elements affecting the public interest in making decisions authorizing or regulating industry operations or corporate structural affiliations. If so, then as the FPC points out (FPC Br. 19-20) reading the obligation into or duplicating the effort in a § 204 proceeding is unnecessary and to the detriment of the consumer. Nothing in the Federal Power Act and nothing in its legislative history suggests that granting, withholding, or conditioning authority to issue securities was intended by the Congress to provide a tool for the FPC to assist in the enforcement or to restrain the violation of the antitrust laws.[16] If Congress intended the FPC to use control over issuance of securities as a tool to provide relief to third parties for antitrust violations, or to restrain such violations, then

[16] The Solicitor General's brief, p. 36, n. 25, observes that the legislative history lacks any indication that Congress intended to exclude consideration of antitrust policies in the administration of § 204. This is not surprising in view of the clear primary purpose of the Congress which is so totally unrelated to antitrust, and that financing is merely supportive of rather than being an industry operation of public utilities subject to FPC regulations.

it would have seemed equally suitable for agencies regulating other industries such as gas pipeline companies, shipping companies, airlines, banks, television and radio stations, telephone and telegraph companies. None of these are empowered to authorize securities issuance. We submit that regulation of securities was omitted from the regulatory schemes Congress provided for such industries because the industry histories did not suggest a need to curb financial abuses. If as declared in brief for Respondent Cities, p. 26, regulation of electric companies is substantially less rigorous than the regulatory scheme applicable to natural gas pipelines under the Natural Gas Act, then why, if Congress intended the FPC to use the authorization of securities to deal with anticompetitive activities of electric companies, did it fail to grant explicit authority to the FPC over issuance of the securities of natural gas companies? It is not credible that such omission was accidental. Dozier A. DeVane, one of the draftsmen of the Federal Power Act says[17] the FPC designated Commissioner Seavy to supervise drafting of the Natural Gas Act as he had supervised drafting of the Federal Power Act.

B. The FPC is Not Authorized to Adjudicate Antitrust Issues.

If under § 204 the FPC must consider antitrust allegations such as those of Cities here which relate to activities outside the authority of the FPC under other parts of the Act, it necessarily follows that the FPC's function would be solely to adjudicate the issue of violation rather than to

[17] DeVane, Highlights of the Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938, 14 Geo. Wash. L. Rev. 30 (1945). This article was cited by the Solicitor General in brief filed in No. 71-991, Otter Tail Power Company v. United States, pending before this Court.

weigh antitrust tendencies as a factor in taking some action authorized under other parts of the Act. It is settled that the FPC lacks the power to adjudicate antitrust issues. *California* v. *Federal Power Commission*, 369 U.S. 482, 486 (1962) and see *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 223 (1943). *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79 (1944), and *United States* v. *Radio Corporation of America*, 358 U.S. 334, at 350, n. 18 (1959). It follows that the FPC could not award reparations for injuries or damages alleged to result from antitrust violations not adjudicated. In fact it appears that the FPC lacks power to grant reparations in any case. This Court has repeatedly held that the FPC lacks power to award reparations in rate cases.[18] In the *Montana-Dakota* case cited in the immediately preceding note in which the court was unanimous in its opinion that the trial court judgment could not stand but divided five to four as to its appropriate disposition, Mr. Justice Frankfurter, speaking for the dissent, said of the Federal Power Act, "The Act likewise does not afford to the Commission the authority conferred on administrative agencies under other regulatory statutes to award damages to those injured by violations of the Act." This was an apparent recognition of a limitation on authority extending beyond the area of rates. If the FPC may not award reparations to those injured by violations of the Federal Power Act, it would surely follow that the FPC has no authority under the Act to award reparations for violations of other laws.

If the FPC had conditioned its authorization for issuance of securities in this case on a requirement to wheel energy for the Cities as now suggested by the Cities, such action

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[18] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Company*, 341 U.S. 246, 254 (1951).

would have of necessity either constituted a grant of reparations to Cities or an indirect injunction against what it judged to be a prospective violation of the antitrust laws. The first is forbidden it under authorities cited in the preceding paragraph. The second would constitute an attempt to enforce the antitrust laws by action beyond the FPC's own authority, a function forbidden it by other authorities cited in the same paragraph and including a prospective situation as recognized in *City of Pittsburg* v. *Federal Power Commission*, 237 F.2d 741, 754 (D.C. Cir. 1956), wherein it said in a case under the Natural Gas Act: "Although *the Commission has no power to enjoin conduct as illegal under the Sherman Act or even to declare such illegality*, it certainly has the right to consider a Congressional expression of fundamental national policy as bearing upon the question whether a particular certificate is required by the public convenience and necessity." (Emphasis supplied.)

It is readily understandable how the FPC could weigh antitrust policy as one element of the public interest under the Natural Gas Act[19] in the course of deciding whether or where a gas pipeline might be laid. It may be equally understandable how the FPC could weigh such considerations in acting, for example, under § 203 of the Federal Power Act to determine whether or not a public utility should be permitted to acquire the stock of an electric utility competitor or potential competitor. But when the FPC is asked to weigh allegations of antitrust violations in connection with authorizing bonds merely for the purpose of refunding short-term debts or, for that matter, considering authorization of securities for cash to fund construction (for which no certification is required) or for general

[19] See e.g., Northern Natural Gas Company v. FPC, 399 F.2d 953, 958 (D.C. Cir. 1968).

corporate purposes of an electric public utility the FPC's function changes. Instead of weighing various considerations bearing on the public interest in approving, modifying, or denying authority to perform an electric industry operation or engage in an industry activity such as to build or acquire a facility or to merge with or acquire the stock of another utility it becomes instead a simple case of judging or making determinations concerning allegations that applicant is about to engage in an activity which would violate the antitrust laws. This is beyond the jurisdiction of the FPC as noted above. The fact that the court below indicates some "nexus" is required does not change the nature of the function proposed for the FPC to perform, to wit, to *judge* as compared to the function of "weighing" as in the gas certificate cases.

The issuance of securities is not an integral function of a public utility involved in transmission of electric energy in interstate commerce or sale of electric energy at wholesale in interstate commerce as such terms are used in § 201 of the Federal Power Act, 16 U.S.C. § 824, and we submit that Congress did not intend that allegations of antitrust law violation or anticompetitive activity be made the subject of FPC's scrutiny except at most as it might be a part of or associated with a public utility operation or activity subject to control of the FPC under some section other than § 204, in which case, as the FPC has observed in its brief p. 11, the matter should be handled under sections relating to such operation or activity without reliance upon § 204.

C. Lack of Notice Provision in § 204 Evidences Congressional Intent That Adversary Proceedings Were Not Contemplated.

Cities dismiss as "totally without merit"[20] the construction Gulf States places on § 204(b) as not requiring the FPC to provide an opportunity for evidentiary hearing to anyone other than the applicant, Cities are not supported by the authorities they cite. Cited FPC regulations may be consistent with but are not supportive of Cities' position that as intervenors in a § 204 proceeding they were entitled to such a hearing. The regulations are equally consistent with a construction that § 204(b) is intended to afford opportunity for hearing only to an applicant in any proceeding in which the FPC authorizes issuance of the securities subject to modifications or upon terms and conditions, or authorizes less than all of the securities applied for. Adjudicatory provisions of the Administrative procedure Act have no application "unless some other statute directs an agency hearing." [*Sisselman* v. *Smith*, 432 F.2d 750, 754 (3rd Cir. 1970) citing numerous cases.] No provisions in the Administrative Procedure Act require opportunity for hearing for any to whom no such opportunity is afforded by the statute in issue [§ 204(b) in this case].

Omission of any sort of notice provision in § 204(b) is significant here because it shows that Congress did not contemplate that parties other than an applicant would participate in any hearings conducted under the section. Contrast the specific provisions for notice contained in § 202(a) and (b), § 203, § 205, § 206 (Pet. App. 44a-52a), and § 207 (Solicitor General's Br. App. 29), each tailored to fit the particular section and to require notice to those who might have an interest and who are intended to have an opporunity to participate in the proceedings. That Con-

[20] Cities Br. 31, n. 34.

gress did not contemplate participation of others than the applicant in § 204 proceedings for authorization of securities is significant here because it points to Congress' intention that proceedings under § 204 not be adversary in nature or provide a forum for airing grievances but should be restricted to consideration of the financial integrity of the issuing company and maintenance of its ability to perform its public utility responsibilities. Adversary issues are thus left for consideration under other sections of the Act where they may be considered in a time frame suitable to the issue and without prejudice to the public interest in the unhampered ability of a public utility to make sound financial arrangements essential to performance of public utility responsibilities.

D. Convenience to the Cities or Expedition of Determination of Their Right to Relief Does Not Justify a Statutory Construction Creating a Remedy Not Intended by the Congress.

Briefs in opposition to Gulf States in this case are uniform in their position that even if some other forum or some other remedy is available to Cities, e.g., proceeding under §§ 306 and 307, Pet. App. 53a-54a, 16 U.S.C. §§ 825e and 825f, or by suit instituted in a judicial tribunal, the remedy would be inadequate because of the longer time which would necessarily be involved in examining antitrust violations or anticompetitive issues, e.g., see Cities' Br. 45, 47-48, Solicitor Gen. Br. 35, Dow Br. 15-16. The point Gulf States sought to make in its original brief is that the availability of other more appropriate forums and suitable remedies is persuasive that none such was intended by the Congress to be available under § 204.

It is the very unsuitability of a § 204 proceeding for consideration of antitrust allegations which gives the section

its greatest appeal to Cities [21] and to Dow.[22] Their arguments indicate that Cities and Dow are interested in a remedy under §204 for the very reason that the urgency inherent in Gulf States' issuance of securities to refund short term debts or to fund construction and for general corporate purposes might result in achievement of Cities' ends within time frames insufficient to allow proper consideration and thereby eliminate the risk of defeat if the issues were developed in an orderly manner in a proceeding better designed for the purpose. The Solicitor General in his brief, p. 35, shares the view that availability of other remedies should not deprive Cities of their choice of a § 204 proceeding. As stated, these positions avoid our major point that existence of other remedies is sound evidence that the Congress did not intend such a remedy in § 204. If § 204 is distorted to provide Cities with a remedy at an accelerated rate, it can only be at the expense of depriving Gulf States of its right to a fair administrative or judicial hearing of the charges made against it.

In connection with "other remedies," we take note that for the first time anywhere in these proceedings, and wholly without any support in fact or in the record, so far as we can discover, Cities have charged (Cities Br. 45) that Gulf

[21] "In short, the proceeding chosen by the Cities, in accordance with the statutory demand is the only proceeding which is likely to lead to *expeditious and effective relief*." (Emphasis supplied.) Cities' Br. 48.

[22] Dow is frank in acknowledging its interest in having anticompetitive issues disposed of in a securities issuance time frame. It says, "A major advantage of considering anticompetitive allegations in a finance case is that the pressures of time require that the issues be disposed of promptly." Dow Br. 15. And further:

"The argument is also made that the aggrieved parties do not need relief under Sec. 204 because other avenues of relief are available to them, including action by the Department of Justice and treble damage suits. The short answer is that no other remedy presents an acceptable alternative." Dow Br. 15-16.

States was providing wheeling service for others. To distinguish decisions holding that the FPC may not require public utilities to wheel power under § 202, Cities make the surprising contention that:

> the question here presented [is] whether the FPC could order a company *which already provides wheeling service for others* to cease its discriminatory refusal to provide the same sort of transmission service for the complainant under Section 205, which prohibits the granting of undue preferences to any person with respect to any service (such as transmission service) subject to the jurisdiction of the Commission, and also prohibits maintaining "any unreasonable difference in . . . service, facilities, or in any other respect . . . ." See also Section 206 (Emphasis is Cities'.) Cities Br. 45.

Here Cities point directly to a specific complaint (which Cities has not made elsewhere in these proceedings) and to a specific remedy provided by the Act and yet call it "the question here presented." The question here presented is, of course, the validity of FPC orders entered in a § 204 proceeding. If Cities have a complaint of discrimination forbidden by § 205 (Pet. App. 49a-51a, 16 U.S.C. § 824d) the specific statutory remedy is a complaint pursuant to § 306 (Pet. App. 53a, 16 U.S.C. § 825e). For what period of time Cities would contend that the newly claimed discrimination had continued it does not say, but it does appear from Cities' Petition to Intervene that the pooling agreement between them, Dow Chemical Company, and LEC which it seeks to activate by use of the transmission facilities of Gulf States (and perhaps facilities of its alleged co-conspirators) was signed in August of 1968. At least since that time Cities and Dow have maintained and operated their own generators (R. 82), Cities for distribution and resale to its customers, *ibid*, and Dow for its own industrial purposes, *ibid*. Such delay in seeking any remedy does

not add plausibility to the argument that plainly available remedies are not sufficiently expeditious to satisfy any complaints the Cities may have. If the degree of impact on the parties has a place in this statutory interpretation, then it is fair to suggest that the urgency described by Cities (Br. 16, 47) to enjoy the benefits of the economies of scale which would flow from use of Gulf States' transmission system to activate its paper pool could not by an stretch of the imagination rise to the same importance in terms of public interest that is inherent in the maintenance of Gulf States' financing time schedules for construction and other corporate purposes in procedures under § 204.

E. The Congress Did Not Intend § 204 as a Forum for Considering Private Injuries or a Means of Redressing Them.

Cities chose to intervene in this § 204 proceeding because of a belief that it "is likely to lead to expeditious and effective relief." Cities Br. 48. Cities were not defending the public interest. They were seeking their own relief.

The purpose of Dow is the same. "Assuming that FPC adheres to this position [that it lacks authority to order a utility to wheel electric power], Dow will be faced with the necessity of going to court before it can obtain effective relief." A somewhat inconsistent statement on the same page is, "An independent proceeding before the Commission, as in FPC Docket No. E-7676, is an alternative, it is true, but not a satisfactory one." Dow Br. 16. Even the Solicitor General comes close to sponsoring Cities' purpose by saying, "it does not appear that additional Commission-ordered interconnections under Section 202(b) between the Cities and the private power companies would have provided the Cities with the economies they were seeking from independent arrangements with LEC and

Dow Chemical." Solicitor Gen. Br. 35. Cities' petition alleges past antitrust violations of Gulf States in opposing construction of generation and transmission lines by LEC and contends that Gulf States should not be permitted to issue securities until it "purges itself" for those past sins. However, recovery of money damages is not the goal of Cities' intervention.[23] The goal is satisfaction of the claimed "need for transmission."[24] Such "relief"[25] nevertheless would be a grant of *reparations,* power for which the Congress has withheld from the FPC.[26] No matter how insistently Cities urge, in defense of the public interest, that the FPC condition authorization of securities upon the commitment of Gulf States to wheel electric energy for the LEC Pool, such a condition would amount to no more than reparations to the Cities by substituting Gulf States transmission lines for the LEC transmission lines Cities allege would have been built except for the alleged unlawful opposition of Gulf States to LEC construction.[27]

F. Flexibility is Not an Acceptable Substitute for a Proper Construction of § 204.

Opposition briefs reveal a complete willingness to deprive Gulf States of orderly processes for the determination of legal rights by forcing consideration of antitrust allegations into the time frame of securities issuance. The concept of the Solicitor General is clearly reflected in his brief wherein he insists that if there is substance to Cities' allegations, Cities are entitled to have them heard in this very proceeding, and "it simply may not be in the 'public interest' to

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[23] Cities Br. 47, Dow Br. 15-16.
[24] Cities Br. 47.
[25] Cities Br. 48.
[26] Montana-Dakota Utilities Co. v. Northwestern Public Service Company, 341 U.S. 246 (1951), citing S.Rep. No. 621, 74th Cong., 1st Sess. 20 at n. 9, p. 654.
[27] Cities Br. 7, Dow Br. 4-5.

approve the issue."[28] Pursuant to FPC order, the bonds have long since been issued, sold at competitive bidding to underwriters, and distributed by them to the public, Pet. Br. 4. The flexibility allowed by the court below which the FPC finds so agreeable and such a satisfactory solution grants more power to the FPC than we believe the Congress intended. It is a very real concern about the broad power placed in the hands of the FPC by that very flexibility which prompted petitioner to seek certiorari. So long as we have the present enlightened Federal Power Commission and legal staff, we would be quite content with the broad discretion allowed for the exercise of their expertise applied in furtherance of the public interest, but we are gravely concerned that if the lower court's opinion is allowed to stand some future Commission, in pursuit of some philosophical objectives at odds with the intent of the Congress, or perhaps merely impatient to clear a cluttered docket, might bring the pressure of threat to withhold authorization of vitally needed securities unless a public utility then making application under § 204 acceded to conditions it was not legally obliged to accept, contrary to the interest of its customers and irrelevant to the proceeding.

IV. The Court Below Erred in Failing to Give Appropriate Weight to FPC Conclusions of Law and Its Determination as to the Appropriate Scope of Its Inquiry and also Erred in Declining to be Bound by FPC Findings and Conclusions of Fact Based on an Undisputed Record.

In the instant case the FPC in proceedings below has already found that intervention by the Cities might be in the public interest for purposes of its consideration of their petition, that there is no relief that it could order in authorizing the issuance of the Bonds that would have

[28] Solicitor Gen. Br. 35.

any effect on the interest of the Cities or solve any of the problems outlined by them, that the matters asserted and activities alleged by Cities are irrelevant to the purpose of issuing bonds to refund short-term indebtedness heretofore authorized and that the matters asserted by Cities do not raise any issue which requires a hearing.[29] To the extent that some of these are conclusions of law this Court has said that while not binding the same are nevertheless persuasive, and it is desirable that a reviewing court have the benefit of such ruling.[30] To the extent that such findings are findings of fact and supported by substantial evidence they are conclusive.[31]

Cities' brief, p. 14, says the court below held lacking in substance a FPC contention that Cities could not be injured because the proposed financing sought only to replace short-term notes with long-term bonds. The FPC did not "contend" but it made findings to that effect.[32] Cities Br. 14 also declares that FPC was unable to answer a question as to the consequence of the refunding presented during oral argument but "conceded it" (Cities imply that it was conceded that the FPC position lacked substance) in a supplemental memorandum filed with the court after oral argument. Such supplemental memorandum by the General Counsel for FPC, which is not in the record, concedes nothing contrary to the FPC findings. It merely advised the court that when Gulf States refunded short-term obligations with the proceeds of the Bonds it could then reborrow the same amount under its short-term authorization. Furthermore, as the court's opinion below said, Pet App. 21a,

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[29] Pet. App. 34a-36a, R.302-303.

[30] Pet. Br. 32. In addition to the authorities there cited, see *Hormel* v. *Helvering*, 312 U.S. 552, n. 5, 556 (1941), *Levinson* v. *Spector Motor Service*, 330 U.S. 49 (1947).

[31] Federal Power Act § 213, 16 U.S.C. § 825 *l*, Pet. App. 56a.

[32] Pet. App. 34a, R. 302.

the court could not permit arguments of counsel to take the place of agency findings (citing cases). Question No. 3 among those presented in Petition for Writ of Certiorari raised the question whether the Court of Appeals could require the FPC to investigate antitrust allegations it had found to be irrelevant. The order of the FPC stated, Pet. App. 34a, R. 302, that "The requested approval of the issuance of the Bonds allow the Company only to change the form of a portion of its outstanding indebtedness. . . . There is no relief that the Commission can order in authorizing the issuance of the Bonds for refinancing purposes that would have any effect on the interest of the petitioners, or solve any of the problems outlined by them." Full quotation of this part of the FPC order appears at Pet. Br. 31. These were findings with regard to matters not in dispute, and were conclusive. The court below should not have reviewed the matter of replacement of short-term notes undertaken in its opinion, Pet. App. 20a-21a, nor should it have rejected the findings in the FPC's order which the court purported to treat (Pet. App. 21a) as merely "contention of FPC counsel." Neither Cities' brief nor explanations in the opinion of the court below at Pet. App. 21a explain that court's description of fact findings in the FPC order as "contentions of counsel" or its statement that "the cryptic statement of the FPC does not permit us to conclude with reasonable confidence that this was the position taken by the FPC," Pet. App. 21a, or justified the court below in disturbing or disregarding the FPC findings. § 215(b), Pet. App. 55a, 16 U.S.C. § 825 *l*. The fact findings in the FPC order, supported by adequate analysis of facts undisputed in the record, should have been treated by the Court of Appeals as binding on it and dispositive of the cause.

V. Respondents Have Confused Object of Securities Issuance With Their Alleged Consequences.

Briefs of Respondents Cities, the Solicitor General, and other parties filing argument in opposition to Gulf States share a common error in confusing the object of Gulf States' issue of bonds with what they allege may be the consequences of use of the proceeds. In so doing, they have ignored the direct, simple, plainly stated and undeniably lawful *object* of refinancing short-term indebtedness declared by Gulf States in its Application, Pet. App. 12, n. 21, R. 5, and found to be the fact in the FPC's order, Pet. App. 34a, R. 302, and insist instead on arguing highly remote, indirect, complicated, speculative, and allegedly unlawful *consequences* which they urge will or might include violations of §2 of the Sherman Act. If it once be established that the FPC in administering § 204 must concern itself not with the immediate object but with possible remote consequences of use of the proceeds of securities issued for cash, as in this case, then the point will have been reached in judicial requirement of complicating and proliferating administrative hearings in unfamiliar fields of which Mr. Justice Harlan warned, remembering the complex Alleghany Corp. litigation, in his dissent in *Denver & Rio Grande*, at p. 518.[33]

CONCLUSION

The arguments presented by Respondents and amici curiae emphasize not only the error of their contention that the FPC considerations under § 204 should extend beyond fiscal integrity and consideration of the public utility's continuing ability to perform its public utility responsibilities, but the differences between this case and *Denver & Rio Grande*. Furthermore, if the FPC is to be required

[33] Denver & Rio Grande Western R. Co. v. United States, 387 U.S. 485 (1967).

to look beyond financial considerations, they should at least be limited to areas of FPC familiarity and authority, and the selection of any limitations or conditions to be placed on the issuance of securities should be restricted to matters within FPC authority to exercise by direct order under other sections of the Federal Power Act or other laws, Otherwise, Pandora's box will be opened, and while the Justice Department might find itself relieved of some of its burdens, the FPC would find itself mired in a morass of investigations in unfamiliar fields serving special interests while its attention to proper functions of protecting the public interest languished. Accordingly, the judgment of the Court of Appeals should be reversed and the orders of the FPC approved.

Respectfully submitted,

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